

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
April 25, 2014 Session

IN RE HARLI B.

**Appeal from the Juvenile Court for Dickson County
No. 0709137CS Nathan T. Brown, Special Judge**

No. M2013-02141-COA-R3-JV - Filed June 27, 2014

Father appeals the modification of the primary residential plan and specifically the designation of Mother as the primary residential parent of the parties' five-year-old daughter. In 2010, Father was designated as the primary residential parent of their two-year old child and the parents were awarded equal and shared parenting time based on an alternating weekly schedule. Over the next two years, the employment and marital status of each parent changed and Mother had three additional children. Based on these changes, Mother filed a petition in July 2012 to modify the primary residential plan requesting that she be designated as the primary residential parent. Finding, *inter alia*, that Mother was no longer employed, that she worked in the home caring for the parties' child as well as her three younger children who were born after the initial plan went into effect, and that she had been acting as the de facto primary residential parent, the court granted Mother's petition and designated her as the primary residential parent. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court Affirmed

FRANK G. CLEMENT, JR., P.J., M.S., delivered the opinion of the Court, in which, RICHARD H. DINKINS, J., and, AMY V. HOLLARS, SP. J., joined.

David D. Wolfe, Dickson, Tennessee, for the appellant, Jeremy B.¹

Sharon T. Massey, Clarksville, Tennessee, for the appellee, Jessica H.

¹This court has a policy of protecting the identity of children in parental termination cases by initializing the last names of the parties.

OPINION

Harli B., the child at issue, was born in 2008 to Jeremy B. (“Father”) and Jessica H. (“Mother”). In 2009, the State of Tennessee initiated a petition to set child support on behalf of Mother. Father counter-petitioned for custody. Following a hearing in February 2010, the trial court designated Father as the primary residential parent due in part to the fact that Mother was temporarily living with her father while Father owned a home and had a stable work schedule from 6:30 a.m. to 3:00 p.m. Monday through Friday. The parenting schedule was set on an equal, sharing arrangement on an alternating weekly basis.²

Not long after the 2010 parenting plan went into effect, Mother married Clint H. She and her husband own a home in Charlotte, Tennessee, and they have three children together. Mother was employed by St. Thomas Hospital for two years, from 2010 until September 2012, however, after the birth of her fourth child she stayed home to care for her family full-time.

Changes have also occurred in Father’s life since the 2010 parenting plan went into effect. Father married Natasha B. in December 2011, with whom he is raising her nine-year-old daughter in their home in Tennessee City, Tennessee. He also changed employment and now works for the City of Dickson Fire Department. He works 24-hour shifts followed by 48 hours off of work; thus, he works every third day.

While Mother’s petition was pending, Mother filed a pendente lite motion to temporarily modify the residential schedule due to the fact Father was attending the state fire academy’s ten-week training program, which would be followed by emergency medical training. On October 16, 2012, the juvenile court granted her motion authorizing Mother to care for their child during the week when Father was attending training. Realizing that Father would soon complete his training and he would resume his work schedule with the fire department, the court ordered that Mother was to care for the child while Father was at work, although Father had the option to take the child to daycare one to two days per week during his residential time. This temporary schedule remained in effect until the final hearing on April 30, 2013.

Both Mother and Father testified at the hearing. Mother stated she had assumed the more active role in the child’s daily care, healthcare, and extracurricular activities. Mother stated that she scheduled all of the child’s medical and dental appointments, kept the child

²The court also ordered that when the child was ready to enroll in school, the schedule would change with Mother having visitation one day during the week, every other weekend, one-half of the child’s school vacations, and holiday visitation.

up-to-date on her vaccinations, and enrolled her in weekly activities such as cheerleading, dance, and soccer. Mother also stated that Father was not fully committed to the child's participation in these activities, explaining the child would frequently miss her activities during her time with Father. She also stated that Father had not attended any of the child's soccer games, even when he was off-work. Although the child was expected to begin kindergarten in the fall of 2013, Mother stated that even though Father was the primary residential parent he had not attended to the details of her registration and he was unsure where she would go to school. She also testified that Father was not maximizing his time with the child as it was his habit to take the child to daycare even when he was not working. Further, Mother stated that Father believed daycare offered the child structure and assisted with her kindergarten preparation, although her daycare was not a pre-school.

Father admitted that during his time off from work, he spent most of his time socializing with friends or picking up odd jobs for extra income at his friends auto repair and detail shops. On occasion, in lieu of daycare, Father would take the child with him to his friends' businesses to visit.

At the conclusion of the trial, the court ruled that Mother had carried her burden of proof to establish a material change in circumstance, which was due, in part, to the fact both parents had married, the birth of three new siblings for the child, Mother's very active role as a stay-at-home parent and in the children's activities, and the change in Father's employment, particularly his unique work schedule. After making the express finding that there were significant changes of circumstances regarding the child, the court stated:

Whenever the issue was before the court in the past, neither parent was married. Now they're both married. Whenever the issue was before the court before, neither had other children. Now, [Mother] has three other children, and [Father] has a stepchild. There's also been major changes in the employment of both parties. [Father] has now gone on to a schedule which is unusual, to say the least. It's just not the normal thing we deal with. If I can get in my head how this works, it's basically a swing shift, because your days off change every week. I believe that's the way it is. So it's even difficult to talk about what kind of parenting schedule there should be. I submit that these changes are such that it affects the welfare of the child to the extent that a best interest determination should be made based on the new circumstances.

Now, I've heard from both parties, and I do feel that both parties have good and adequate homes, that they're both good parents. However, there are some factors that weigh more heavily than others in my opinion. The first one is that [Mother] is able to be at home with the child all the time. No daycare is

needed. She has three other blood siblings there with Harli, and I think that weighs in her favor as being the primary residential parent. She's obviously also the most involved with Harli for whatever reason. She has been the one to take Harli for her doctor's appointments, take Harli for her dental appointments, and has utilized time with Harli to the extent that, yes, the father could have been doing these things and maybe would have had the mother not been. But she's been the one who's been really, although not designated as such, she's been performing the tasks of the primary residential parent since we were last in court.

[Father] has some very good points on his side. He's in the same home that Harli has lived in since birth. He's married and evidently has a loving home. He has a step-daughter, who is obviously someone who Harli could look up to and could even help with taking care of Harli. I don't find either parent is unfit in any way. I think both are very good parents to Harli. I just feel that [Mother] has taken more steps to spend more time with Harley [sic], and it would be in the best interest of Harli that she live, as the primary residential parent, with [Mother]. This is not to take anything away from [Father]. He just has an odd schedule, and it's very difficult for him even to consider to be primary residential parent without a lot of daycare, because of his schedule. And whenever he does have time off, obviously he doesn't spend it all with Harli, and he probably shouldn't. But still, you compare that with a house full of kids, with Harli living amongst a whole family on a regular basis, I just submit that it is in her best interest to live that way. I don't take anything away from either parent because of the size of their home or their incomes. There's nothing in the record to show that Harli has been in any way not taken care of, physically or emotionally by either parent[.]

The final order was entered on August 22, 2013, finding that there had been a significant change of circumstances and that it was in the child's best interest for Mother to be the primary residential parent, the juvenile court modified the parenting schedule. This appeal followed.

Father identified two issues on appeal. He contends the evidence at trial was insufficient to establish a material change of circumstances prompting a change of the primary residential parent. He also contends the trial court failed to properly consider the child's best interests.

ANALYSIS

Existing parenting plans are favored because children thrive in stable environments. *Rigsby v. Edmonds*, 395 S.W.3d 728, 735 (Tenn. Ct. App. 2012) (citing *Hoalcraft v. Smithson*, 19 S.W.3d 822, 828 (Tenn. Ct. App. 1999)). Moreover, “[a] custody decision, once made and implemented, is considered res judicata upon the facts in existence or those which were reasonably foreseeable when the decision was made.” *Id.* (citing *Steen v. Steen*, 61 S.W.3d 324, 327 (Tenn. Ct. App. 2001)). However, the trial court may modify custody “when both a material change of circumstances has occurred and a change of custody is in the child’s best interests.” *Kendrick v. Shoemake*, 90 S.W.3d 566, 568 (Tenn.2002)). The “threshold issue” is whether a material change in circumstances has occurred after the initial custody determination. *Id.* at 570 (citing *Blair v. Badenhope*, 77 S.W.3d 137, 150 (Tenn. 2002)).

A petition to change the primary residential parent invokes a two-step analysis, *Cranston v. Combs*, 106 S.W.3d 641, 644 (Tenn. 2003), and the petitioner bears the burden of proof in each step. *Hoalcraft*, 19 S.W.3d at 828. First, the petitioner must prove by a preponderance of the evidence that a material change of circumstances has occurred. *See* Tenn. Code Ann. § 36-6-101(a)(2)(B); *Kendrick v. Shoemake*, 90 S.W.3d 566, 568 (Tenn. 2002). Second, the petitioner must show that a change of custody is in the child’s best interest. *Id.*

Although there are no bright-line rules for determining when such a change has occurred, there are several relevant considerations: (1) whether a change has occurred after the entry of the order sought to be modified; (2) whether a change was not known or reasonably anticipated when the order was entered; and (3) whether a change is one that affects the child’s well-being in a meaningful way. *Cranston*, 106 S.W.3d at 644 (citing *Kendrick*, 90 S.W.3d at 570; *Blair*, 77 S.W.3d at 150).

STANDARD OF REVIEW

A trial court’s determination of whether a material change in circumstances has occurred and whether modification of a parenting plan serves a child’s best interest are factual questions. *Armbrister v. Armbrister*, 414 S.W.3d 685, 692 (Tenn. 2013); *In re T.C.D.*, 261 S.W.3d 734, 742 (Tenn. Ct. App. 2007). Our review of a trial court’s findings of fact is de novo with a presumption of correctness. Tenn. R. App. P. 13(d). We will affirm the trial court’s decision unless the evidence preponderates against the trial court’s factual determinations or unless the trial court has committed an error of law affecting the outcome of the case. *Boyer v. Heimermann*, 238 S.W.3d 249, 254-55 (Tenn. Ct. App. 2007). “We will also give great weight to the trial court’s assessment of the evidence because the trial court

is in a much better position to evaluate the credibility of the witnesses.” *Id.* at 255 (citing *Burton v. Warren Farmers Co-op.*, 129 S.W.3d 513, at 521 (Tenn. Ct. App. 2002)).

I. MODIFICATION OF PRIMARY RESIDENTIAL PARENT

A. MATERIAL CHANGE OF CIRCUMSTANCES

“A material change of circumstance may include, but is not limited to, failures to adhere to the parenting plan or an order of custody and visitation or circumstances that make the parenting plan no longer in the best interest of the child.” Tenn. Code Ann. § 36-6-101(a)(2)(B). In the present case, the trial court principally identified two changes which warranted modification of the primary residential parent: (1) changes in the child’s family dynamics, including her parents’ marriages and the addition of three younger siblings; and (2) the significant changes to Father’s work schedule.

When the 2010 parenting plan went into effect, neither party was married. Father was working a traditional schedule of Monday through Friday from 6:30 a.m. to 3:00 p.m. In December 2011, Father accepted a position with the fire department and his work schedule changed significantly. He would work a 24 hour shift and then was “off” for 48 hours. Under the initial parenting plan, the parties were alternating weekly parenting time; however, given the uniqueness of Father’s work schedule, his days off did not correlate with a standard parenting schedule. Moreover, during his days off, Father chose to spend most of his time with friends at their auto-body and mechanic shops where he would work on his own vehicle or lend a helping hand for extra income. It was undisputed that the child enjoyed the time she spent with Father, and the daycare she attended offered structure and taught educational fundamentals that assisted in her preparation for kindergarten; however, the trial court considered the foregoing and concluded that the numerous changes, including but not limited to, Father’s work schedule constituted material changes of circumstances that affected the welfare of the child.

Both parents married subsequent to the 2010 parenting plan. After Mother married, she moved out of her father’s home and now has her own home where she works full-time in the home nurturing her four young children in a stable, loving environment. Father married and has a loving home; however, his new work schedule decreased his daily accessibility, was variable in that his days off changed, and during the limited times when he was off work, he chose to place the child in daycare or let her tag-a-long as he pursued his own interests and other optional work. Although a parent’s subsequent marriage does not necessarily constitute a material change of circumstances, “change in home environment” resulting from

a marriage is a factor to consider in determining whether there has been a material change of circumstances. *Armbrister*, 414 S.W.3d at 705 (citing *Tortorich v. Erickson*, 675 S.W.2d 190, 192 (Tenn. Ct. App. 1984)).

Considering these facts and after reviewing the record in its entirety, we have concluded that the evidence does not preponderate against the trial court's findings that material changes of circumstances occurred since the 2010 parenting plan went into effect. Therefore, we affirm the determination that material changes of circumstances have occurred since the 2010 parenting plan went into effect.

B. BEST INTEREST OF THE CHILD

A finding that a material change of circumstances has occurred does not require that a change of custody or visitation be made; instead, these determinations hinge on the best interests of the child. *Scoggins v. Scoggins*, No. M2007-02148-COA-R3-CV, 2008 WL 2648966, at *5 (Tenn. Ct. App. July 2, 2008). In taking into account the child's best interest, the court shall order a parenting arrangement that permits both parents to enjoy the maximum participation possible in the life of the child consistent with the factors delineated in Tennessee Code Annotated §§ 36-6-106(a)(1)-(10).

In making the best interests analysis, the court shall consider all relevant factors, including the following, where applicable:

- (1) The love, affection and emotional ties existing between the parents . . . and the child;
- (2) The disposition of the parents . . . to provide the child with food, clothing, medical care, education and other necessary care and the degree to which a parent . . . has been the primary caregiver;
- (3) The importance of continuity in the child's life and the length of time the child has lived in a stable, satisfactory environment . . . ;
- (4) The stability of the family unit of the parents . . . ;
- (5) The mental and physical health of the parents;
- (6) The home, school and community record of the child;
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(9) The character and behavior of any other person who resides in or frequents the home of the parent . . . and the person's interactions with the child; and

(10) Each parent's . . . past and potential for future performance or parenting responsibilities, including the willingness and ability of each of the parents . . . to facilitate and encourage a close and continuing parent-child relationship between the child and both of the child's parents, consistent with the best interest of the child.

Tenn. Code Ann. § 36-6-106(a).

Several of the factors favor each parent equally, such as the love, affection and emotional ties existing between the parents and the child, the disposition of each parent to provide food, clothing and other necessary care, the stability of the family unit of both parents, and the mental and physical health of the parents. Nevertheless, the evidence supports the juvenile court's finding that it is in the child's best interests for Mother to be the primary residential parent due to the availability and stability Mother provides to care for the child when contrasted to Father's preference for daycare and his unique work schedule.

With the foregoing in mind, we have determined that the trial court acted within its discretion in designating Mother as the primary residential parent. We therefore affirm.

IN CONCLUSION

The judgment of the trial court is affirmed, and this matter is remanded with costs of appeal assessed against the appellant, Jeremy B.

FRANK G. CLEMENT, JR., JUDGE